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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5414

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 578 F.2d 427 and is reproduced in the Appendix at p.

117, *et seq.*[1] The opinion and order of the District Court granting defendants' motion for summary judgment is reported at 429 F. Supp. 167 and is reproduced at App. 93, *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 23, 1978 The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). An Order extending time to file the petition for writ of certiorari until September 21, 1978 was entered on August 7, 1978. The petition for certiorari was granted on Janury 8, 1979 (App. 131).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

QUESTIONS PRESENTED

I. Is a libel plaintiff necessarily a public figure subject to the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, because he had engaged in conduct which resulted in his becoming a defendant in a criminal proceeding?

[1] This Appendix will be hereinafter cited as "App." References to the record in the courts below to the extent not printed in the Appendix here will be cited as "CA App." or by other identifying reference.

II. In an action governed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, may a court grant summary judgment to the defendants by accepting the testimony of the author whose state of mind is at issue, and itself choosing among the conflicting inferences which can be drawn from that testimony and other evidence?

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

In 1974, Reader's Digest published the book *KGB: The Secret Work of Soviet Agents ("KGB")*, written by John Barron (App. 27, 53; CA App. 27). All editions of *KGB* published by Reader's Digest and reprint publishers contained the following defamatory statements relating to the petitioner, Ilya Wolston:

> *Among Soviet agents identified in the United States were* Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.*

* No claim is made that this list is complete. *It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments*, or who fled to the Soviet bloc to avoid

prosecution. (App. 28, emphasis added; see App. 5; CA App. 114).

In addition, the index to *KGB* contains the reference: "Wolston, Ilya, Soviet agent in U.S." (App. 29).

The statements identify Wolston as a Soviet agent, join his name with those infamous figures of Soviet espionage, and suggest that he had been indicted or convicted of espionage or perjury in connection with espionage investigations.

Wolston filed a libel suit in the United States District Court for the District of Columbia against the author, Reader's Digest, and the subsequent publishers of *KGB*, alleging that the statements were false (App. 3-6). The District Court granted the defendants' motion for summary judgment, and the Court of Appeals affirmed. The basis for granting summary judgment, insofar as it was affirmed by the Court of Appeals, was that Wolston was a public figure, required as a matter of law to establish "actual malice" by the defendants, and that the facts, including the testimony of the book's author with respect to his state of mind when he wrote the passages pertaining to Wolston, demonstrated that Wolston "could [not] show enough to go to a jury on the issue of actual malice" (App. 124).

B. Facts Pertaining to the Public Figure Issue

Ilya Wolston was the nephew of Jack and Myra Soble, who were arrested by the FBI in Janury 1957

on espionage charges and later pled guilty (App. 35, 36, 91). On June 28, 1958, Wolston was served at his residence in Washington, D.C. with a subpoena requiring his appearance in New York on July 1 before a federal grand jury investigating Soviet espionage in the United States (App. 36-37, 89, 92). Wolston had responded to several earlier subpoenas and had testified before the grand jury sitting in New York (App. 37, 86; CA App. 211). In addition, beginning with the arrest of the Sobles in January 1957, he had submitted to lengthy interrogations by the FBI not only in Washington, where he lived, but also in New York, where his appearance had been compelled by prior grand jury subpoenas (App. 91; CA App. 210-212). Indeed, Wolston had responded to the grand jury subpoena immediately preceding the subpoena of July 1st, only to be told on his arrival in New York that the grand jury would not be sitting that day. Instead, he was ushered into a room and subjected to further FBI interrogation (App. 91-92). After Wolston received the grand jury subpoena for July 1st, his wife arranged to contact the United States Attorney's Office in the Southern District of New York to inform it that Wolston was ill and might not be able to appear (App. 89; CA App. 218; see App. 91).[2] Wolston did not in fact appear in New York on July 1 (App. 92).

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[2] Representations with respect to Wolston's medical condition, supported by medical certificates, had previously been submitted in an effort to persuade the United States Attorney's Office and the FBI not to require him to travel to New York for

An order to show cause why he should not be held in contempt was issued, returnable on July 28. Wolston appeared in court on that date and offered to testify before the grand jury. The offer was rejected. A trial on the contempt charge was convened and his wife, then pregnant, was called to testify as to his mental condition on the return date of the subpoena. After she became hysterical on the stand, Wolston entered a plea of guilty. A one-year suspended sentence was imposed, conditioned on his cooperation with federal authorities, and he was placed on three-years' probation (App. 37, 92).

Brief newspaper stories relating to Wolston appeared in various Washington and New York newspapers during the six-week span between his failure to appear and sentencing: six on July 15 and one on July 16 reported his failure to appear before the grand jury and the issuance of the show cause order; three on July 29 reported the contempt hearing; two on August 8 reported the guilty plea; and three on August 14 reported the sentencing (App. 41-52).

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lengthy interrogations, but to accept his offer to submit to more frequent but shorter interviews in Washington (App. 91). Beginning with the illness and death of his daughter in 1956, Wolston had become extremely depressed and was under almost constant medical care (App. 91; CA App. 194, 195). At the time of service of the subpoena with which he did not comply, he was in the midst of extensive electro-shock treatments (CA App. 218)

C. Facts Pertaining to The Research and Writing of KGB

Prior to writing *KGB*, defendent Barron, then an associate editor of Reader's Digest, engaged in a prolonged feasibility study of a work on Soviet espionage (CA App. 34, 39-40). During the course of that study, Barron and other employees of Reader's Digest approached various foreign and domestic security and intelligence agencies to ask for their assistance (App. 9). The United States agencies contacted included the FBI, CIA and the State Department (App. 9). These agencies all indicated that they would cooperate with the author in his project (App. 11-13).

In January of 1969 Barron received authorization from Reader's Digest to proceed with the book (CA App. 54). He was given permission to travel extensively, to invest as much time and research as was necessary and to take maximum advantage of the world-wide research capacities of the Reader's Digest organization, which included what Barron described as "magnificant" facilities in New York and Paris and staff offices in many foreign countries, including Germany (App. 13-16). A professional researcher was assigned on a full-time basis to assist Barron and did so for over four years (App. 25-26). These aids to accuracy and depth of research were trumpeted in the preface to the book (Pl. Ex. 1 to the Deposition of John Barron, *KGB*, preface pp. xi, xii).

The research and writing of *KGB* took over four years (App. 14).

Barron testified at deposition that he possessed information about Wolston from two sources: a book entitled *My Ten Years As A Counterspy,* written by Boris Morros and published in 1959; and a report entitled "*Expose of Soviet Espionage*" prepared in May 1960 by the Federal Bureau of Investigation for transmittal to and publication by the Internal Security Subcommittee of the Senate Judiciary Committee (App. 17-18; CA App. 67, 89, 103-104; see CA App. 68).

Morros had been a Jack Soble confederate who later became a double agent for the FBI. In his book, Morros stated that Soble had told him of a certain "Slava" who supplied Soble with information, had described Slava as "tall, handsome, blond, a native-born American," and had eventually identified his nephew, Ilya Wolston, as Slava (App. 30-32). However, Morros pointed out that the only information he had pertaining to Wolston had come from Soble, whom he knew to be "a confirmed liar" (App. 34). Barron was "very familiar" with the Morros book and knew of Morros' characterization of Soble (App. 11, 25).

The FBI report similarly refers to "Slava," who is described as a "U.S. Army Colonel in Germany," states that Soble identified his nephew Wolston as Slava in 1955, and that following his guilty plea in April 1957, Soble "furnished information identifying Wolston as a Soviet Agent" (App. 82). The report also claimed that Wolston had been "dismissed" from

his State Department employment in Berlin in 1951, based upon his "probable identification" as "a Soviet agent" and data concerning "his black market activities" (App. 83).

While Barron admitted that he possessed information about Wolston from these two sources, he insisted that his sole source "for the purposes of documentation" was the FBI report (App. 18; see App. 54). While he stated by affidavit that he was aware at no time "of any fact that would give me reason to doubt the truth of the FBI Report or of any statement in it" (App. 54), he knew that at least part of the information about Wolston had come from Soble, that Morros expressed distrust of Soble's veracity, and that no action had been taken against Wolston relating to his alleged espionage activities despite the statements made in the report (App. 18, 25; CA App. 69-70). Although Barron testified that "[w]e wanted to be able to cite as frequently as possible our sources, so as to enable the reader to make his or her own judgment as to the credibility of what we were saying" (App. 8; see App. 53-54), he did not disclose his reliance on the Morros book (see App. 28-29, 53-54) and the fact that both of his sources had relied entirely or in major part on a confessed espionage agent and "confirmed liar."

Moreover, despite the seriousness of the statements concerning Wolston and notwithstanding that the information in the FBI report had been gathered during the emotion-laden period of the cold war when

false accusations of pro-Soviet activity and hysterical acceptance of such accusations were rampant, Barron chose to adopt without reservation the statement that Wolston was a Soviet agent (App. 18). He did so without utilization of the extensive research facilities available to him, without any inquiry of the federal agencies which had assured him of their willingness to cooperate, and without investigation of any kind (App. 16, 18, 26; CA App. 33, 73-74, 89-92). Inquiry would have established, among other things, that Wolston had not been "dismissed" by the State Department but had been terminated due to a reduction in force (CA App. 181), that Wolston had been employed by the Army Map Service following his purported identification as a Soviet agent (CA App. 192-193), and that the description of Slava as a U.S. Army Colonel did not mesh with Wolston's actual position as a low ranking civilian employee (see CA App. 173, 175-178).

D. Actions of the Courts Below

On this record, the courts below first concluded that Wolston was a "public figure". Then, according total acceptance to Barron's self-serving statements that he harbored no doubts as to the accuracy of the FBI report and did not intend to suggest that Wolston had been indicted and perhaps convicted of espionage (App. 127, 129 (Court of Appeals opinion); App. 114-115 (District Court Opinion)), determined that summary judgment should be granted, thereby depriving Wolston of an opportunity to have a jury

assess Barron's credibility and reach inferences with respect to the publication of these defamatory statements about petitioner different than the inferences drawn by the judges who considered the matter.

SUMMARY OF ARGUMENT

The degree of constitutional protection accorded for defamatory falsehood varies with the status of the person defamed. If a public official or "public figure" is defamed, liability may not be imposed in the absence of actual malice *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 (1967). If a non-public individual is defamed, actual malice need not be established, but liability may not be imposed in the absence of fault. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347-348 (1974). While there are two categories of "public figures" (*id.* at 345), only one was relied on by defendants below: that some persons' conduct is such that they become public figures with respect to particular controversies.

The lower courts held that petitioner, Ilya Wolston, was such a "limited-issue" public figure because he failed to respond to a grand jury subpoena requiring his apperance before a federal grand jury investigating espionage, and was subsequently convicted of contempt. "Limited-issue" public figures, however, are those who strive for exposure and take action for the purpose of impacting upon society with respect to a particular public controversy. They may be deemed

to have waived their interest in privacy and to have assumed the risk of defamatory falsehood by virtue of seeking public attention in an attempt to attain their goal. Because they seek to influence, the public has an interest in assessing their views, actions and background, and the actual malice standard allows the media substantial "breathing space" in meeting this interest.

Under these principles, petitioner may not properly be found to be a public figure. He did not purposefully seek to engage the public's attention for the purpose of influencing society's views with respect to some public issue.

Even if petitioner is a public figure and the actual malice standard applies, entry of summary judgment was plainly inappropriate. For liability turns on the state of mind of the defendants; and questions of credibility and, even in a libel case, inferences to be drawn from the evidence are for the jury, not the trial judge or the court of appeals. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Agosto* v. *Immigration and Naturalization Service*, 436 U.S. 748 (1978).

Moreover, the Court of Appeals applied a special rule in granting summary judgment, ostensibly to protect the First Amendment interest articulated in *New York Times*. This rule, however, is unsupported by that case and its progeny, and its application distorts the balance this Court established in *Gertz* between uninhibited debate on public issues and the countervailing societal interest in protecting reputation from defamatory falsehood.

ARGUMENT

I.

Petitioner Is Not a Public Figure

A. In a line of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court has established the constitutional parameters of liability for defamatory falsehood concerning matters of public interest where the statements themselves carry a warning of their defamatory potential. *New York Times* held that when a public official is defamed, liability may not be imposed in the absence of clear and convincing proof of "actual malice," *i.e.*, knowledge that the statement was false or reckless disregard as to its truth or falsity. *Id.* at 279-280. Three years later in the companion cases of *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 (1967), the standard of proof required of public officials was extended to "public figures", persons who while they do not hold office "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, C.J., concurring in result). And in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court distinguished between two types of "public figures": those who "occupy positions of such persuasive power

and influence that they are deemed public figures for all purposes" and those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. The latter are deemed public figures only with respect to those particular controversies. But in either case the emphasis is upon the public figure as persuader, as influencer, who "invite[s] attention and comment"—attention and comment being essential to his purpose. *Id.*

Extension of the *New York Times* privilege as to such persons has been justified in that they have some of the characteristics of public officials which create a public interest in free criticism. Like public officials, they ordinarily have "access to the channels of effective communication," *Gertz,* 418 U.S. at 344, and because of this access they can "influence policy and * * * counter criticism of their views and activities." *Butts,* 388 U.S. at 164 (Warren, C.J., concurring in result). Like public officials, they may also be said to have relinquished their interest in privacy in order to attain a goal, and to have assumed the risk of defamatory falsehoods by virtue of seeking public attention as the necessary consequence of their public involvement. *Gertz,* 418 U.S. at 344-345.[3] They have

[3] Their interest in access to the press is in fact aided by application of the actual malice standard, which, by granting substantial "breathing space," encourages the press to cover their ideas and activities. See *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 47 n.15 (1971).

voluntarily assumed "an 'influential role in ordering society.'" *Id.* at 345, *quoting Butts,* 388 U.S. at 164 (Warren, C.J., concurring in result).

By virtue of their influence on public issues, such persons' views and actions are of as much concern to citizens as the attitudes and behavior of public officials. *Butts,* 388 U.S. at 162 (Warren, C.J., concurring in result). The public has an interest in assessing the positions they espouse, and the media concomitantly require substantial "breathing space" in fulfilling this interest. Indeed, because such persons do not hold public office and are therefore "not subject to the restraints of the political process," "public opinion may be the only instrument by which society can attempt to influence their conduct." *Id.* at 164 (Warren, C.J., concurring in result).

For example, General Walker's public advocacy on radio and television against federal intervention to effectuate desegregation was "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155 (opinion of Harlan, J.); see *id.* at 162, 165 (opinion of Warren, C.J., adopted in opinion of Brennan, J. at 172); *Gertz,* 418 U.S. at 352. In contrast, Elmer Gertz was not deemed to be a public figure despite many publications on issues of general importance (*Gertz* Appendix at 154-157), numerous public appearances in Chicago and other cities (*Gertz* Appendix at 103-106) and long involvement in community and professional affairs. Further, his representation of a

client in a wrongful death action against a police officer who had been indicted for murder and was subsequently convicted, and his appearance at the coroner's inquest did not inject him into the forefront of the public controversy surrounding the death or police activities in a manner which would make him a public figure for purposes of those limited issues. Similarly, Mrs. Firestone, despite her notoriety in Palm Beach society, her status as a party to a well-publicized matrimonial action, and her "non-domesticated" conduct which contributed to the public interest in that matrimonial action, was held not to be a public figure since she had not achieved general fame or voluntarily injected herself into the forefront of a public controversy to influence its outcome. *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). Even her holding of press conferences was held insufficient to alter her status because she did not seek to use them as a vehicle to impact upon issues of public concern. *Id.* at 454-455 n.3.

Gertz and *Firestone* recognize that a person's private status cannot be lost by merely performing an act which results in media exposure. Particularly, the mere fact that a person's actions bring him into court is insufficient to make him a public figure.

> [T]he majority [of participants in litigation] will more likely * * * [be] drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or *to defend themselves against actions brought by the State* or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. (*Firestone*, 424 U.S. at 457, emphasis added).

Firestone teaches that publicity generated by state action, or by virtue of a requirement that state processes be utilized, must be disregarded in determining whether an individual involved in the proceeding is a public figure. Instead, analysis must be focused on that person's own acts to determine whether they may be deemed to have been designed to draw public attention for the purpose of influencing the public's views on public issues.

B. Purporting to follow the principles of *New York Times, Gertz* and *Firestone*, the Court of Appeals improperly held that Ilya Wolston had lost his status as a private person merely because—sixteen years prior to publication of respondents' book—he had failed to respond to one grand jury subpoena and was subsequently convicted of contempt.[4] As the District Court

[4] By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage. (App. 122-123 (Court of Appeals opinion); see App. 107-110 (District Court opinion)).

recognized, Wolston never sought to engage the public's attention: "Ilya Wolston apparently led a thoroughly private existence and was generally unknown before receiving his first subpoena, early in 1957, and after that as well, until his failure to appear before the special grand jury became public knowledge. After the flurry of publicity attending his conviction ceased, he apparently succeeded, for the most part, in resuming his private ways" (App. 103, footnote omitted; see App. 104-105, 108-109). He was drawn into the controversy over espionage only because the federal government sought to interrogate him.

Wolston's failure to respond to the July 1 subpoena was in no way designed to draw attention to himself so as to invite public comment or to influence the public with respect to any issue. He did not hold a press conference. He did not issue a statement challenging the power of the Government to investigate his or others' activities. He did not make a public plea to arouse public sentiment against the harassment he was suffering at the hands of the State. Rather, the

Subsequent disposition of a criminal charge must be disregarded as relevant to a person's status as a public figure, although it may have a bearing on the truth of the defamatory statements. See *Anderson* v. *Stanco Sports Library*, 542 F.2d 638 (4 Cir. 1976). To hold that an act which results in prosecution *ipso facto* subjects the actor to the burden of proving actual malice in a libel action would mean that many persons later vindicated by acquittal will lose the protections the libel laws otherwise afford, while those later found guilty would be subject to sanctions in addition to those found sufficient by the State.

facts suggest no more than that Wolston—mentally ill, anxious and depressed—simply failed to go to New York on July 1, 1958, hoping that he would be allowed to withdraw or at least minimize his role in the ongoing investigation. Under the teachings of this Court, Wolston could not acquire "public figure" status merely because, as the lower courts found, one could impute to him the knowledge that his failure to appear would invite public attention and comment.[5]

Were it otherwise, the rejected rule of the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), would re-enter by the back door, for as Mr. Justice Brennan there recognized, "'[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.'" 403 U.S. at 47.[6]

[5] Moreover, if one were to adopt a rule of law that whether or not a libel plaintiff is a public figure turns on whether he knew or should have known that his actions were likely to produce publicity, constitutional privilege would turn on an amorphous test involving not only reasonable expectancies with respect to the course of action taken, but also reasonable expectancies with regard to alternatives. For example, in this case repeated appearances by Wolston before a grand jury known to be investigating espionage were not likely to remain unnoticed. In the era of the investigative reporter, any involvement in a grand jury investigation is likely to produce publicity, all too often even with respect to the testimony given to the grand jury. Further, if Wolston had sought to quash the subpoena for prosecutorial abuse, publicity would have undoubtedly ensued.

[6] The District Court made this error when it held Wolston was a public figure despite its recognition that he did not purposefully seek to engage the public's attention (see App. 104-105, 108-109).

In rejecting *Rosenbloom*, this Court has made it clear that one may become associated with an issue before the public without *ipso facto* losing one's status as a private individual. Rather, one becomes a public figure only through action undertaken with a view to impacting upon a public controversy in order to influence its resolution.

To hold that Wolston's failure to appear was not for the purpose of influencing the public's views with regard to the espionage controversy does not require a determination of his subjective intent. Rather, the objective indicia of his intentions compel this result: his ready submission to lengthy FBI interrogation despite his illness; his prior appearance before the grand jury; the representations as to his medical condition, supported by medical certificates; his offer to submit to more frequent but shorter interviews in Washington; and his subsequent offer to testify again before the grand jury. There was no indication whatever that Wolston intended to have any impact on the public. The publicity generated at the time by his failure to appear reveals his attempt to remain a private man: the newspapers reported his *disappearance* from public view (App. 41, 42, 44); his attempt to *avoid* appearing before the grand jury because of *illness* (App. 43, 46, 47, 48, 49, 51, 52); and the fact that, "[r]eached at home, Wolston denied knowledge of either the July 1 subpoena or the 'show-cause' order. *He would not comment further*" (App. 48, emphasis added).

If Wolston is not stamped a public figure, this does not mean the imposition of "strict liability" upon defendants which "may lead to intolerable self-censorship", for *Gertz* requires proof of "fault" as the minimum basis for liability for "defamatory falsehood injurious to a private individual" (418 U.S. at 340, 347). That is the accommodation between the societal values of avoidance of "self-censorship by the news media" and the protection of the "'essential dignity and worth of every human being'" by providing "compensation of individuals for the harm inflicted on them by defamatory falsehood" (*id.* at 341) which is appropriate in this case.

II.

Even If Petitioner Was Properly Deemed To Be A Public Figure, The Courts Below Erred In Granting Summary Judgment To The Defendants On The "Malice" Issue

A. Under *New York Times*, once the plaintiff has been determined to be a public official or public figure, he must show that the defendant published the defamatory statement "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. Liability thus turns on the state of mind of the defendant. In determining that the defendants were entitled to summary judgment on the malice issue, the courts below accepted as true the disposition testimony and affidavit of the defendent Barron, the au-

thor of *KGB*, which describes his writing of the book and his own thinking with respect to the defamatory statements about Wolston contained therein.

Both the District Court and the Court of Appeals relied heavily on the statements of Barron's affidavit:

> I was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it. * * * At no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or any statement in it. (App. 54, *quoted at* App. 127 (Court of Appeals opinion); see App. 114 (District Court opinion)).

And both courts below discussed to some length why they believed that the evidence presented on the motion supported the conclusion that Barron's reliance on the FBI report was reasonable, notwithstanding Morros' characterization of Soble and Barron's failure to check Wolston's employment record with the State Department or to make any other inquiry (App. 127-129 (Court of Appeals opinion); App. 114-115 (District Court opinion)).

The District Court "agree[d] with Wolston that the footnote at page 188 of the Reader's Digest edition of *KGB* appears to state falsely that he was indicted for espionage"; yet the court said, "Nevertheless, the statement is ambiguous; Barron's explanation of it is plausible and, in the court's opinion, offered in good

faith" (App. 115). The Court of Appeals compounded this error when, after quoting, and apparently crediting Barron's explanation it added: "We must agree with Wolston that the second sentence of the note is imprecise and ambiguous, and might be read as an awkward and involuted statement that he was indicted; but we think it does not follow as a reasonable inference that in writing it Barron was reckless or acted in bad faith" (App. 129).

The decisions of this Court have made it entirely clear that questions of credibility are not to be resolved on summary judgment. In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), the Court said:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." (*Id.* at 473, footnote omitted).

Poller is especially in point because under the *New York Times* standard the defendant's state of mind is the focus of inquiry.

These principles were emphatically reaffirmed at the last Term in *Agosto* v. *Immigration and Naturalization Services,* 436 U.S. 748, 756-757 (1978):

> [J]ust as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467-468 (1962), 6 J. Moore, Federal Practice ¶ 56.02[10], p. 56-45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a *de novo* hearing on his claim of citizenship because of the court's assessment of the credibility of the evidence * * *. Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a *de novo* hearing, since "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Poller* v. *Columbia Broadcasting System, Inc., supra,* at 473.

It is also well established that " '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" *Adickes* v. *S.H. Kress and Co.,* 398 U.S. 144, 158-159 (1970), *quoting United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962).

B. It is clear from the foregoing that if the defendants' motion for summary judgment had been measured by the usual tests, it would have been denied. However, the Court of Appeals for the District of Columbia Circuit has developed a special rule for determining whether summary judgment should be granted in defamation cases where the standard of liability is governed by *New York Times Co.* v. *Sullivan.*

In Washington Post Co. v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967), which was cited by the court below in introducing its discussion of the malice issue (App. 124), the court, after describing the important functions of summary judgment, stated: "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." Judge Wright, the author of that opinion, reaffirmed and enlarged upon those views in *Wasserman* v. *Time, Inc.,* 424 F.2d 920 (D.C. Cir.), *cert. denied,* 398 U.S. 940 (1970). On behalf of himself and Circuit Judge Robinson, he wrote (*id.* at 922):

> In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. *Cf.* Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plantiff can prove actual malice in the *Times* sense, it should

> grant summary judgment for the defendant. Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 20 A.L.R. 3d 972 (1966), cert. denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). Compare Goldwater v. Ginzburg, 2 Cir., 414 F.2d 324, 336-337 (1967), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970).

But the Court of Appeals for the Ninth Circuit has expressly disagreed with the District of Columbia Circuit. In *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael*, 492 F.2d 438 (9 Cir.), *cert. denied*, 419 U.S. 872 (1974), the court said:

> We agree with our brothers of the District of Columbia and Fifth Circuits[7] that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to "examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." To be unprotected, actual malice must be shown with "convincing clarity." *New York Times, supra*, 376 U.S. at 285-286, 84 S.Ct. at 728-729.

[7] The Court's reference here is to the decision in *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 864-865 (5 Cir. 1970), where the court had cited and quoted from *Wasserman* with approval. However, the Ninth Circuit observed in *Ysrael*: "We note that this language [in *Bon Air Hotel*] does not include a reweighing of the evidence, including credibility of witnesses: it merely states the usual rule to be followed when summary judgment is involved." 492 F.2d at 440.

However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in *Wasserman* which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence

> is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case. (*Id.* at 441, emphasis in original).

The Ninth Circuit then examined with care the authorities on which Judge Wright had relied in *Wasserman* and concluded that none supports his thesis. We note particularly what the court said about this Court's opinion in *New York Times:*

> We find nothing in this language in indicate that the Court's examination was to disregard the usual rules for determining whether a case should go to the jury. It merely requires a reexamination as to whether the evidence, viewed most favorably to the plaintiff, is sufficient to meet the *New York Times* standard if the jury accepts it. (492 F.2d at 442).

The court also observed that in cases subsequent to *New York Times* where this Court examined the evidence to determine whether there was sufficient proof of malice to permit the case to go to the jury, it did not decide the credibility of witnesses or select between permissible inferences. 492 F.2d at 442-443, discussing *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). *Time,*

Inc. v. *Hill,* 385 U.S. 374 (1967) and *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81 (1967).[8]

The Ninth Circuit's demonstration that, contrary to the view of the District of Columbia Circuit, *New York Times* and its progeny address only the "*standard* against which the evidence must be examined" but not "the *manner* in which the evidence is to be examined in the light of that standard" (492 F.2d at 441, emphasis in original) is so sound, and states the position so accurately, that we need offer only one additional thought.

The *New York Times* standard represents an accommodation between "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (376 U.S. at 270) and the countervailing societal interest in protecting the reputations of individuals from the harm inflicted on them by defamatory falsehood. As stated in *Gertz,* 418 U.S. at 341:

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[8] The court commented also on three Court of Appeals decisions which had been cited in *Wasserman.* The court found in *Washington Post* v. *Keogh, supra,* "no hint that the court of appeals was making its own judgment as to credibility." 492 F.2d at 443. However, since that opinion had been written by Judge Wright himself, we may assume that he understood what was there intended when he cited *Keogh* in *Wasserman.* The *Ysrael* court was, however, correct in stating that *Goldwater* v. *Ginzburg,* 414 F.2d 324 (2 Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970) and *Time, Inc.* v. *Ragano,* 427 F.2d 219 (5 Cir. 1970). "appl[y] the normal rule". 492 F.2d at 443.

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See *New York Times Co.* v. *Sullivan*, *supra*, at 293 (Black, J., concurring); *Garrision* v. *Louisiana*, 379 U.S., at 80 (Douglas, J., concurring); *Curtis Publishing Co.* v. *Butts*, 388 U.S., at 170 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The District of Columbia Circuit's special summary judgment rule for cases governed by *New York Times* makes it considerably more difficult for a plaintiff even to obtain a trial on the malice issue than if the usual and accepted summary judgment procedures were applied. Particularly because the *New York Times* standard calls for an inquiry into the defendant's state of mind, as to which the defendant can usually, if not always, provide self-serving deposition testimony and affidavits, which the plaintiff can rebut only by requesting the trier of fact to draw from the objective evidence the inference that the denial is untrue, *cf. Morissette* v. *United States*, 342 U.S. 246, 276 (1952), the court has erected an obstacle which,

as this case starkly illustrates, few defamed plaintiffs will be able to surmount. This result comes perilously close to providing the publishers of defamatory falsehoods with the absolute immunity proposed by a minority of the court in *New York Times*, *Garrison* v. *State of Louisiana*, 379 U.S. 64 (1964), and *Butts*, and thereby sacrifices "the individual's right to the protection of his own good name [which] 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz*, 418 U.S. at 341, *quoting Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded for a trial on the merits.

Respectfully submitted,

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